

**BEFORE THE HEARING EXAMINER *PRO TEMPORE* OF THE
CITY OF REDMOND**

IN THE MATTER OF THE APPEALS OF)	FILES: L070006, L070007, L070008,
NORMAN L. WHERRETT, JR., ADRIENNE)	L07009, L070010, L070011, L070012,
ZUCKERBERG, CHARLES & KRISTIN)	L070013, L070015, and L070016
JAZDZEWSKI, JEFFREY SCHUR, NAOMI)	
CALL, JON L. WILCOX, ST. JUDE)	
CATHOLIC PARISH-SHARE/WHEEL,)	FINDINGS, CONCLUSIONS, AND
AMANDA FLEIG, SHELLY SCHUR, AND)	DECISION
SHERI ERNST FROM A TYPE I PERMIT)	
ISSUED BY THE REDMOND PLANNING)	
DIRECTOR UNDER FILE NO. L060474)	
FOR A TEMPORARY USE, TO WIT: TENT)	
CITY 4)	
_____)	

DECISION SUMMARY

The Redmond Hearing Examiner *Pro Tempore* **GRANTS** the Jazdzewski appeal; **GRANTS IN PART**, in principle, the Zuckeberg, Call, Wilcox, St. Jude-SHARE/WHEEL, and Fleig appeals; and **DISMISSES** the Wherrett, J. Schur, S. Schur, and Ernst appeals. The application is **REMANDED** for processing in accordance with this Decision.

INTRODUCTION

On December 21, 2006, the Redmond Department of Planning and Community Development (Planning) issued a Type I Temporary Use Permit (TUP) under file number L060474 to co-applicants St. Jude Catholic Parish (St. Jude) and SHARE/WHEEL to operate a homeless encampment (Tent City 4) on St. Jude's church property for not more than 110 days, approximately from February 11 to May 13, 2007. (Exhibit R1.5¹)

¹ Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

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Ten persons/entities filed appeals from the TUP.² (Exhibit R2.5) The appeal number, appellant, appellant's address, and filing date of each appeal are:

Appeal File Number/ Exhibit Number	Appellant/Address	Filing Date
L070006 Exhibit A3	Norman L. Wherrett, Jr. 16808 NE 104 th Court Redmond, WA 98052	January 3, 2007
L070007 Exhibit A4	Adrienne Zuckerberg 16905 NE 104 th Court Redmond, WA 98052	January 3, 2007
L070008 Exhibit A5	Charles and Kristin Jazdzewski 11530 160 th Court NE Redmond, WA 98052	January 3, 2007
L070009 Exhibit A6	Jeffrey Schur 9807 171 st Avenue NE Redmond, WA 98052	January 4, 2007
L070010 Exhibit A7	Naomi Call 9322 166 th Place NE Redmond, WA 98052	January 4, 2007
L070011 Exhibit A8	Jon L. Wilcox 17019 NE 101 st Place Redmond, WA 98052	January 4, 2007
L070012 Exhibit A9	St. Jude Catholic Parish - SHARE/WHEEL 10526 166 th Avenue NE Redmond, WA 98052	January 4, 2007
L070013 Exhibit A10	Amanda Fleig 10316 179 th Avenue NE Redmond, WA 98052	January 4, 2007

² After this initial introduction, all individual appellants will be referred to only by their last names for simplicity sake, except that first initial and last name will be used for the two appellants who have the same last name. No disrespect is meant by either style of notation.

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L070015 Exhibit A11	Shelly Schur 9807 171 st Avenue NE Redmond, WA 98052	January 4, 2007
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L070016 Exhibit A12	Sheri Ernst 17004 NE 101 st Place Redmond, WA 98052	January 4, 2007
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The subject property is located at 10526 166th Avenue NE, Redmond, in the Education Hill planning subarea.

John E. Galt, Redmond Hearing Examiner *Pro Tempore* (Examiner), held a prehearing conference on January 10, 2007, to establish procedures for the appeal. (Exhibit A1) The results of that conference are contained in an Order Memorializing a Prehearing Conference, issued on January 11, 2007, and incorporated herein by reference. (Exhibit A2) The Order “consolidated [all 10 appeals] for hearing and decision making purposes.” (Exhibit A2, p.2, ¶ 1)

On January 12, 2007, the Examiner issued an Interlocutory Order Summarily Dismissing Three Appeals. That Order dismissed appeals L070009 (J. Schur), L070015 (S. Schur), and L070016 (Ernst) for lack of standing. (Exhibit R2.1) That Order is incorporated herein by reference.

The Examiner convened an open record hearing at 10:00 a.m. on January 29, 2007. The City gave notice of the hearing as required by the Redmond Community Development Guide (RCDG). (Exhibit R2.4) The Examiner adjourned the hearing at approximately 9:45 p.m. on January 29, 2007.

Testimony under oath was presented by:

Steven Fischer	Adam Ross
Kristin Jazdzewski	Jane Koler
Naomi Call	Steven Pyeatt
Jon Wilcox	Scott Morrow
Lt. Malcolm Frederick	Jay Beavers
Lisa Tracy	Robert Odle

Oral argument was presented by:

James Haney, Attorney at Law for Respondent Redmond Planning
Rod Harmon, Attorney at Law for Applicant/Appellant St. Jude
Theodore Hunter, Attorney at Law for Applicant/Appellant SHARE/WHEEL
Jane Koler, Attorney at Law for Appellants Jazdzewski

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The following exhibits were offered and admitted:

By Appellant Call:

- Exhibit C1: Main argument
- Exhibit C2: "Recommended Shelter Health and Safety Best Practice Guidelines," Seattle-King County Public Health, July 2005
- Exhibit C3: Excerpts from Chapter 246-360 WAC
- Exhibit C4: City of Bellevue Ordinance No. 5615, July 26, 2005
- Exhibit C5: "Prevention and Control of Tuberculosis ...," Centers for Disease Control
- Exhibit C6: "Public Health – Seattle & King County support services for Tent Cities 3 and 4," Seattle-King County Public Health
- Exhibit C7: "Bothell First Evangelical Lutheran Church / SHARE/WHEEL Transitory Accommodations Permit Application, Findings, Conclusion and Decision," August 11, 2006
- Exhibit C8: RCW 70.160.075
- Exhibit C9: "Agreement Between King County and SHARE/WHEEL," May 5, 2004
- Exhibit C10: ONDCP Drug Policy Information Clearinghouse Fact Sheet: Drug-Related Crime
- Exhibit C11: Treatment Advocacy Center Briefing Paper: Violent Behavior: ...
- Exhibit C12: Excerpt: Homelessness: Programs and the People They Serve
- Exhibit C13: Rebuttal arguments

By Appellant Jazdzewski:

- Exhibit K3: Appeal Memorandum, January 18, 2007

By Appellant/Applicant St. Jude:

- Exhibit H1: Declaration of Fr. David A. Rogerson
- Exhibit H2: Tent City 4 FAQ, City of Redmond website, 1/24/2007
- Exhibit H3: "Tent City Doesn't Seem to Affect Crime Rates," Seattle Times, 5/21/2004
- Exhibit H4: Tent City Code of Conduct

By Appellant/Applicant SHARE/WHEEL:

- Exhibit SW1: Memorandum in Support of Appeal (Reply brief)

By Appellant Wilcox:

- Exhibit W1: Appeal arguments
- Exhibit W1A: RLUIPA Text
- Exhibit W1B: Statement of Appeal, Charles & Kristin Jazdzewski
- Exhibit W1C: City of Bellevue's Motion for Partial Summary Judgment in Cause No. C05-1921JCC
- Exhibit W1D: "Community has plenty to say about tent city," June 19, 2006
- Exhibit W1E: "Crime and Tent City"

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Exhibit WR1: Redmond Tent City TUP Staff Report Rebuttal

From Appellant Zuckerberg:

- Exhibit Z1: Hearing memorandum
- Exhibit Z1A-B: Excerpt from "Woodinville Tent City 4 End of Term Report"
- Exhibit Z2A-B: City of Bothell Interoffice Memorandum, September 30, 2004
- Exhibit Z3A-B: City of Shoreline Memorandum, October 26, 2004
- Exhibit Z4A-B: Bellevue City Council, Summary Minutes of Regular Session, April 18, 2005
- Exhibit Z5A-D: "Community has plenty to say about tent city," June 19, 2006

By Respondent Planning:

- Exhibit R1: Catalogue of documents with enclosures R1.1 – R1.5
- Exhibit R1.1: Application, November 14, 2006
- Exhibit R1.2: Notice of Public Meeting and Certificate of Mailing, November 29, 2006
- Exhibit R1.3: Public Meeting synopsis, December 13, 2006
- Exhibit R1.4: Public correspondence
- Exhibit R1.5: Notice of Decision, December 21, 2006
- Exhibit R2: Technical Committee Report, January 22, 2007
- Exhibit R2.1: Interlocutory Order, January 12, 2007
- Exhibit R2.2: Vicinity aerial photograph
- Exhibit R2.3: Notice of Public Meeting, November 29, 2006
- Exhibit R2.4: Certification of Hearing Notice and Rescheduled Appeal Hearing Notice, issued on or before January 11, 2007, for the January 29, 2007, hearing
- Exhibit R2.5: Ten Appeal Application Forms
- Exhibit R2.6: E-mail from Toni Pratt, City of Bellevue, January 10, 2007
- Exhibit R2.7: E-mail from Jay beavers to Steve Fischer, January 9, 2007, with Site Plan Theta attached
- Exhibit R3: Memorandum, Redmond Police Department, January 25, 2007
- Exhibit R4: Reply/Response Brief, City of Redmond

Administrative Exhibits entered by the Examiner *Pro Tem*:

- Exhibit A1: Notice of Prehearing Conference
- Exhibit A2: Order memorializing a Prehearing Conference
- Exhibit A3: L070006 Appeal Application Form, Wherrett
- Exhibit A4: L070007 Appeal Application Form, Zuckerberg
- Exhibit A5: L070008 Appeal Application Form, Jazdzewski
- Exhibit A6: L070009 Appeal Application Form, J. Schur
- Exhibit A7: L070010 Appeal Application Form, Call
- Exhibit A8: L070011 Appeal Application Form, Wilcox
- Exhibit A9: L070012 Appeal Application Form, St. Jude's Church-SHARE/WHEEL
- Exhibit A10: L070013 Appeal Application Form, Fleig

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- Exhibit A11: L070015 Appeal Application Form, S. Schur
Exhibit A12: L070016 Appeal Application Form, Ernst
Exhibit A13: E-mail, Fischer to Galt, January 11, 2007, forwarding E-mail, Wherrett to Fischer, December 20, 2006
Exhibit A14: Appeal Hearing Notice, issued January 5, 2007, for a January 22, 2007, hearing
Exhibit A15: All E-mail correspondence between the parties and the Examiner *Pro Tem* between January 10 and 28, 2007, relating to this consolidated appeal

Wherrett neither submitted exhibits nor participated in the hearing. SHARE/WHEEL moved for summary dismissal of Wherrett's appeal at the outset of the hearing due to his absence. The Examiner tabled the motion. SHARE/WHEEL renewed its motion near the end of the hearing. The Examiner GRANTED the motion at that time: An appellant who neither submits any evidence in support of his/her appeal nor participates in the appeal hearing has failed to properly prosecute his/her appeal.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

ISSUE

Did Planning err in issuing a TUP to St. Jude-SHARE/WHEEL for a homeless encampment?

FINDINGS OF FACT

1. St. Jude's church facilities are located on approximately eight acres in the northeast quadrant of the 166th Avenue NE/NE 104th Street intersection (the subject property).³ The subject property slopes downward, dropping approximately 40 feet from east to west. The subject property's perimeter is a naturally wooded area of various widths. A large wooded area covers the south and southwest portion of the subject property. The church buildings themselves are essentially located in the northeast quarter of the subject property, surrounded by parking lots. Vehicular access to the subject property is available via one driveway in the southeast corner from NE 104th Street and a second driveway in

³ Area estimation calculated from dimensions contained on Exhibit R.1, Site Plan Omega, and from Exhibit R2.2. The TUP application (Exhibit R1.1, unnumbered p. 1) states the "Project Site" area to be approximately 10,220 square feet (SF); the TUP (Exhibit R1.5, p. 5) and Staff Report (Exhibit R2, p. 3) repeat that figure. The figure is intuitively incorrect: The TUP application states that the site contains 37,201 SF of existing buildings. The buildings cannot cover three times the area of the property. The Examiner believes that the "Project Site" figure on the TUP application represents the applicant's estimate of the area which would be used in hosting Tent City 4, not the area of the church property.

the northwest corner from 166th Avenue NE. The driveways are connected by an internal circulation drive and parking lots. (Exhibits R1.1, R1.5, and R2.2)

2. The subject property is in an area designated Single Family Urban on the adopted Redmond Comprehensive Plan. Allowed residential densities under that designation are 4 – 8 dwelling units per gross acre. The subject property and surrounding area are zoned R-6, a single-family residential zone. (Exhibit R1.5, p. 5)

The R-6 zone's allowed uses and bulk regulations are found in Chapter 20C.30 RCDG.⁴ Permitted uses in the R-6 zone include single-family residences, rental rooms, adult family homes, home businesses, parks, etc. Listed Conditional Uses in the R-6 zone include small multiple-family structures, residential care facilities, day care centers, certain athletic facilities, public schools, religious facilities of "250 – 750 seats & accessory activities & uses," etc. Special Uses in the R-6 zone include accessory dwelling units, bed and breakfasts, family day care providers, religious facilities "<250 seats & accessory activities & uses," etc. [RCDG 20C.30.20-030, Land Uses Chart]

3. The subject property is located in the Education Hill Neighborhood of Redmond. Single family residential subdivisions surround the site. Redmond Junior High School, with a student population of around 850, occupies the southwest quadrant of the 166th Avenue NE/NE 104th Street intersection, diagonally across the intersection from the subject property. Horace Mann Elementary School is located on the south side of NE 104th Street approximately two blocks east of the subject property. Redmond High School, with a student population of approximately 1,500, is located on the north side of NE 104th Street approximately six blocks east of the subject property. The Norman Rockwell School is also located in the area (but not close enough to be shown on Exhibit R2.2). The collective student enrollment of those four schools is around 3,000. Hartman Park is located across NE 104th Street from the high school's athletic fields. Numerous trails are found in the area, primarily associated with the schools and park. The area is served by a single bus route which runs every 45 – 60 minutes. (Exhibits R1.2 {unnumbered p. 3}, R1.5, and R2.2 and testimony)
4. "SHARE is a non-profit Washington corporation that advocates for and provides services for homeless persons. WHEEL is part of SHARE." (Exhibit C9, p. 1, § I.A) SHARE is coed; WHEEL is female only. (Testimony)

⁴ The RCDG, like most, if not all, municipal development regulations in Washington State, is organized in a hierarchical structure. Unlike most such organizational structures, the RCDG includes four rather than three major levels. The format of RCDG citations is TTT.CC.DD-SSS where TTT represents the Title (typically in the form of two digits followed by a capital letter), CC represents the Chapter, DD represents the Division (the level not commonly found in other municipal development regulations), and SSS represents the Section. Levels below the Section are typically referred to as Subsections, regardless of how many levels below the Section they are. This unique hierarchical naming convention was established in 1997 when the RCDG was completely reorganized. [RCDG, "Publisher's Note" and "How to Amend the Code: Code Structure and Organization" pages, immediately preceding the Table of Contents]

SHARE/WHEEL started its first homeless persons encampment in the Fall of 1990 (Tent City 1). It began opening a network of indoor shelters, now numbering 14, shortly thereafter. Tent City 2 was opened in 1998; it closed shortly thereafter. Tent City 3 was started in 2000 and Tent City 4 opened in Bothell in 2004; both are still in operation. (Testimony)

5. The Tent City model relies on “host” property owners, typically religious organizations, to allow the encampment on their property for a period of generally 90 days. SHARE/WHEEL arranges both primary and back-up sites for Tent City 4 far into the future. Tent City 4 has been located in Bothell, Woodinville, Bellevue, Kirkland, and other Eastside sites since its formation. It is presently located (for the second time) at St. John Vianny Church in the Finn Hill area of unincorporated King County. (Exhibits R4, W1C, and W1D and testimony)

The facility consists of 60 two-person tents, a 20-person tent for new arrivals, a meeting tent, a cooking tent, a storage tent, a TV/library tent, a donations tent, a security tent, portable toilets, a shower facility, and a dumpster. Tent City 4 depends upon its host to provide access to water and electricity and disposal of “gray water.” (Exhibit R1.1, unnumbered p. 3) The designed capacity is 100 persons. (Exhibit R1.1, unnumbered p. 1) The encampment is enclosed by a fence with a single entry/exit point. (Exhibit H2)

SHARE/WHEEL manages Tent City 4. Tent City allows single male and female adults and couples to reside in it; children are not allowed. It is self-governed by its residents. Tent City 4 differs from SHARE/WHEEL’s indoor shelters in that it provides storage spaces for residents’ belongings and is open around the clock. (Exhibit H2 and testimony)

SHARE/WHEEL provides bus and taxi passes for Tent City 4 residents. (Exhibit R1.1)

The average stay at Tent City 4 is about six weeks. Two people have been Tent City 4 residents since its inception; three or four have been residents for more than one and a half years. (Testimony)

6. St. Jude Parish invited Tent City 4 “for a 90 day emergency stay on parish property”. (Exhibit H1, p. 3, ¶ 6) St. Jude and SHARE/WHEEL filed a joint application on November 14, 2006, to locate Tent City 4 on St. Jude’s property

in order to provide shelter to up to 100 homeless people for a duration of 90 – 110 days starting February 11th, 2007 and ending tentatively on May 13th, 2007. End date to be determined by logistical considerations around the move of TC4 and the permitting process of the follow-up host site.

(Exhibit R1.1, unnumbered p. 3)

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Two alternative site plans were submitted with the application: Plans Alpha and Omega. Plan Alpha locates the encampment south of the church buildings; Plan Omega splits the encampment between an area south of the buildings and an area between the buildings and the western parking lot. (Exhibit R1.1, unnumbered p. 5)

7. Short-term temporary uses are a Type I land use application. [RCDG 20F.30.15-040] Type I applications do not require public notice or a public hearing. [Division 20F.30.30 RCDG] Notice to adjacent land owners is optional at the Planning Director's discretion. [RCDG 20D.190.10-040(10)] The Planning Director determined that a public meeting would be beneficial; notice was issued and a meeting was held on December 13, 2006, at Redmond Junior High School. (Exhibits R1.2 – R1.4 and testimony)
8. Planning approved the requested TUP on December 21, 2006, subject to 12 conditions. (Exhibit 1.5; the conditions are listed on pp. 3 & 4) The ten appeals followed, filed on January 3 and 4, 2007, within the codified appeal period. (Exhibits A3 – A12) The J. Schur appeal (Exhibit A6), S. Schur appeal (Exhibit A11), and Ernst appeal (Exhibit A12) were Summarily Dismissed for lack of standing on January 12, 2007. (Exhibit R2.1) The Wherrett appeal (Exhibit A3) was summarily dismissed during the January 29, 2007, hearing.
9. During the January 29, 2007, hearing, Planning offered the following comments/requests for revision regarding the TUP's conditions of approval:
 - A. Condition 1. As written, this condition requires the permittee to submit a modified site plan before encampment population reaches 65 persons, proving that the site can handle up to 100 persons. (Exhibit R1.5, p. 3)

Planning recommends that Exhibit R2.7, Plan Theta, submitted by St. Jude on January 9, 2007, be accepted as fulfilling this requirement. (Testimony)

In Plan Theta, the entire encampment, except for eight "overflow" tents, the dumpster, and storage tents, is clustered between the church buildings and the western parking lot. Eight "overflow" tents occupy eight paved parking stalls along the north edge of the encampment. The "overflow" tents would be required if occupancy exceeded 90 persons. The dumpster and storage tents are to be located southwest of the church buildings on the far side of the parking lot. (Exhibit R2.7)

TUP Condition 2 requires all Tent City 4 facilities to be located within one fenced area; TUP Condition 3 bars placement of any tents within the church parking lot. (Exhibit R2.7, p. 3) Plan Theta conflicts with TUP Conditions 2 and 3.

- B. Condition 2. This condition essentially rejects both Plan Alpha and Plan Omega. It requires that the encampment "be located on the pervious surface area located

west of the church between the surface parking lot and the church buildings.” (Exhibit R1.5, p. 3)

Planning recommends that Plan Theta be accepted as meeting this condition. (Testimony)

As noted above, Plan Theta conflicts with TUP Condition 2.

- C. Condition 3. This conditions bars “placement of tents, portable toilets, or other such non-motorized equipment” within any of the church’s parking lots. (Exhibit R1.5, p. 3)

Planning recommends that the condition be relaxed to allow overflow tents to be located within the parking lot. (Testimony)

As noted above, Plan Theta conflicts with TUP Condition 3.

- D. Condition 8. This condition requires “security background checks for new residents ... [to] be processed through the Redmond Police Department.” (Exhibit R1.5, p. 3)

The Redmond Police Department (RPD) does not perform “background checks.” It can easily perform “warrant and registered sex offender” checks. RPD testified that it had used the latter term in its discussions with Planning. Planning acknowledges the terminology error and asks that the latter term be substituted for the former term in Condition 8. (Testimony)

- E. Condition 10. This condition prohibits Tent City 4 residents from “perform[ing] neighborhood security foot patrols into the adjoining residential neighborhood.” (Exhibit R1.5, p. 4)

Planning acknowledges that it cannot bar a person from walking on public sidewalks. It thus recommends that Condition 10 be revised to read essentially as follows: “While the City recognizes that individuals cannot be prohibited from walking on public sidewalks, the City encourages Tent City 4 to discourage foot patrols through the adjoining residential neighborhoods.” (Testimony)

- F. Condition 12. Condition 12 requires SHARE/WHEEL and the next proposed Tent City 4 host organization to “begin application with the appropriate governmental jurisdiction within ten (10) days of occupying the St. Jude’s Church site.” (Exhibit R1.5, p. 4)

The next planned host for Tent City 4 is Church of the Resurrection in Bellevue. That church has begun the pre-application process; Bellevue staff expects to receive an application by the end of February. (Exhibit R2.6)

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Planning recommends that Exhibit R2.6 be accepted as demonstrating compliance with Condition 12. (Testimony)

10. The many individual issues/concerns raised by the appellants in their Appeal Application Forms (Exhibits A3 – A12) address ten general areas:⁵

Topic	Wherrett	Zuckerberg	Jazdzewski ⁶	J. Schur	Call	Wilcox	St. Jude - SHARE/WHEEL	Fleig	S. Schur	Ernst
Permit violates RCDG provisions			X	X		X				
90 day limit should be imposed	X				X	X			X	
Fencing	X					X				
Health requirements	X				X	X		X		X
Security	X	X		X	X	X		X		X
Traffic congestion					X					
Liability insurance	X				X			X		
General compatibility						X			X	
Permit conditions 8, 9, and 10 should be stricken ⁷							X			
Neighborhood meetings needed	X									X
Bellevue ordinance 5615 should be adopted	X									

⁵ The shaded columns indicate the four appeals which were dismissed, three before the hearing, one during the hearing. Every issue but two raised by any of those four appeals is also raised by at least one of the seven remaining appeals. One exception is Wherrett's request that a condition be imposed on the TUP requiring the Redmond City Council to adopt Bellevue's Ordinance No. 5615. Such a permit condition would be meaningless at best and illegal at worst: A private permittee cannot force a city's legislative body to take an action.

The other is Wherrett's and Ernst's request that the City be required to hold frequent neighborhood meetings during the term of the encampment. Such a condition, too, would be meaningless at best and illegal at worst: A private permittee cannot force the city to take an action.

⁶ Jazdzewski raised SEPA compliance for the first time in their Appeal Memorandum. (Exhibit K3) Issues not contained within the initial Appeal Application Form (and attachments thereto) or a supplemental filing made before the close of the appeal period may not be raised subsequently. The Examiner is without jurisdiction to consider the SEPA compliance complaint.

⁷ St. Jude-SHARE/WHEEL originally challenged TUP Conditions 1, 2, 8 – 10, and 12. (Exhibit A9) St. Jude and SHARE/WHEEL are satisfied with Planning's statements regarding Conditions 1, 2, and 12; they withdrew their appeal as to those Conditions. If Condition 10 is totally eliminated, not just revised, they would drop that portion of their appeal. (Exhibit SW1 and statement of counsel) Appeal issues withdrawn by an appellant are not considered.

Each general area will be addressed separately in the following Findings.⁸

Permit violates RCDG provisions

11. TUP regulations are found in two distinctly different areas of the RCDG: Title 20D RCDG, City-Wide Regulations; and Title 20F RCDG, Administration and Procedures: Chapter 20D.190 RCDG, Temporary Uses; and Division 20F.40.170 RCDG, Temporary Use. A side-by-side comparison of the relevant provisions of both is provided in the Appendix hereto for the reader's convenience.

The current version of both sets of provisions is the result of the same enactment: Ordinance No. 2118, effective February 14, 2002. That ordinance recodified and restructured former Section 20C.20.245 RCDG as Chapter 20D.190 RCDG⁹ and added nearly duplicate provisions as Division 20F.40.170 RCDG (albeit in a slightly different order). (Official notice) Such duplication is unusual in the RCDG: The decision making criteria for most, if not all, other types of permits are found only in Title 20F RCDG.

Chapter 20D.190 RCDG contains provisions not found in Division 20F.40.170 RCDG, one of which is apparent in the Appendix. Therefore, the former will be cited and relied on throughout the remainder of this Decision.¹⁰

12. Temporary encampments, whether for the homeless or for any other group of people, are not a listed temporary use. [RCDG 20D.190.10-050(1) – (5)] Neither are they a use listed in the Residential Zones Permitted Land Uses Chart at RCDG 20C.30.20-030.
13. The TUP process is normally administrative in nature, with the Planning Director having the authority to approve or deny the application. [RCDG 20D.190.10-020 *et seq.*] Planning interprets RCDG 20D.190.10-050(6) to allow the Planning Director to administratively permit any temporary use, not just uses similar to those listed in Subsections (1) – (5), so long as the proposed use is “associated with” a permitted use on the same parcel and so long as it can meet the approval criteria of RCDG 20D.190.10-030 and the performance standards of RCDG 20D.190.10-040.¹¹ Planning interprets the

⁸ The technical Committee Report includes a much more detailed summary of appeal issues and relief requested. (Exhibit R2, pp. 5 – 11)

⁹ Chapter 20D.190 RCDG contains only one Division: Division 20D.190.10 RCDG, also entitled Temporary Uses.

¹⁰ Standard rules of statutory construction, which also apply to the construction of municipal ordinances, hold that where two provisions in a municipal code conflict, the one enacted most recently would prevail. That rule does not help here as both sets of provisions were last enacted/amended by the same ordinance. The Examiner believes it reasonable to use the more expansive of the two simultaneous enactments.

¹¹ The Technical Committee Report states in one place that “Tent City is an accessory to the St. Jude’s church.” (Exhibit R2, p. 13, § C.6, Response paragraph) Planning testified that the use of the word “accessory” was a mistake. Planning does not believe that Tent City 4 is an accessory use as that term is

(Footnote continued on next page.)

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code to hold that the only temporary use applications which would have to go before the Council under RCDG 20D.190.10-070(2) are those not enumerated in RCDG 20D.190.10-050(1) – (5) proposed as “stand alone” uses on a vacant parcel. In other words, Planning believes that if an unlisted temporary use is proposed on a parcel containing a use listed in the Permitted Land Uses Chart for the applicable zone, the administrative approval process applies, but if the same use is proposed for a vacant parcel, then the Council would be the decision maker. (Testimony)

14. Jazdzewski and Wilcox believe Planning’s interpretation of the code is erroneous. They argue that RCDG 20D.190.10-050(6) allows the Planning Director to approve temporary uses not listed in Subsections (1) – (5) only when the proposed use is similar to one of the listed uses. For all other proposals, which in their opinion would include Tent City 4, they believe that RCDG 20D.190.10-070 requires that the application be presented to the City Council for a public hearing and subsequent decision. (Exhibits K3, W1, and WR1, testimony, and argument)

90 day limit should be imposed

15. “No short-term temporary use shall occupy or operate within the City of Redmond for more than six months within any calendar year unless approved by the City Council under a long-term temporary use permit.” [RCDG 20D.190.10-040(5)]

The TUP as issued allows Tent City 4 to locate on the St. Jude property “for a maximum of 110 days”. (Exhibit R1.5, p. 3, Condition 1) Planning testified that it set the limit at 110 days because 110 days is less than six months and the application requested a 110 day maximum. (Testimony)

16. Tent City 4 has traditionally moved to a new site about every 90 days. SHARE/WHEEL testified that it could move at the end of 90 days but preferred a few days of flexibility in case the next site was not ready and to allow the move to occur on a weekend when host organization members would be better able to assist with the moving process. (Testimony)
17. Participants at the December 13, 2006, public meeting were told by Planning that the stay would be “for 90-100 days.” (Exhibit R1.3, p. 1)
18. An Agreement Between King County and SHARE/WHEEL in 2004 expressly limited the duration of stay to “no more than 90 days at a County-approved site.” (Exhibit C9, p. 1, § III.C.1)

defined in the RCDG. (If it were an accessory use, the Temporary Use process would not apply: Accessory uses are permitted as a matter of right with the permitted, conditional, or special use to which they are accessory. [RCDG 20A.20.010 “Accessory Use” and RCDG 20C.30.20-020(7)]

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The Transitory Accommodation Permit issued by the City of Bothell on August 11, 2006, for location of Tent City 4 on church property in that city limited the stay to “a period not to exceed 90 consecutive days”. (Exhibit C7, p. 39, Condition 11)

19. Call and Wilcox believe that, if the TUP is approved, length of stay should be strictly limited to not more than 90 days. (Exhibits A7 and A8)

Fencing

20. The TUP requires that “All Tent City facilities shall be located within one fenced area.” The permit does not specify the type or height of the required fence. (Exhibit R1.5, p. 3, Condition 2)
21. The application does not indicate that the encampment is to be fenced. (Exhibit R1.1) When SHARE/WHEEL and Bothell First Evangelical Lutheran Church (First Lutheran) filed an application in June, 2006, to locate Tent City 4 on First Lutheran’s property, that application stated that the encampment would be surrounded by a six foot high fabric privacy fence. (Exhibit C7, p. 3, Finding 1 and p. 17, Finding 26, ¶ 2)
22. Although Plan Theta does not indicate fencing, it is apparent that all encampment facilities could not be enclosed in one fenced area: The storage and dumpster facilities lie across the St. Jude parking lot from the remainder of the encampment facilities. Were the entire encampment to be enclosed in one fenced area, that area would, of necessity, have to include at least part of that parking lot and would render unusable the portion of the parking lot east of the dumpster. (Exhibit R2.7)
23. Call wants Tent City 4 enclosed by a sight-obscuring fence at least six feet high. (Exhibit A7) Wilcox requests that the “encampment ... be fenced for 2 way privacy and security since the site is not fully screened by the foliage.” (Exhibit A8)

Health

24. The TUP requires that the encampment “comply with all applicable standards of the Seattle-King County Health Department.” (Exhibit R1.5, p. 3, Condition 5)
25. The Seattle-King County Health Department (Health Department), not Redmond, is the jurisdictional health agency. (Testimony)
26. The Health Department has issued “Recommended Shelter Health and Safety Best Practice Guidelines.” (Exhibit C2) Recommended Guidelines are not regulations. The Health Department provides “education and consultation around a range of health issues” to the Tent Cities through its Health Care for the Homeless (HCHN) program. (Exhibit C6, p. 1) A public health nurse is available for consultation at Tent Cities 3 and 4. “An Environmental Health inspector is assigned to Tent City to provide consultation at set up and on an as-needed basis.” (Exhibit C6, p. 1) The record contains no evidence that the Health Department has adopted any regulations specifically applicable to Tent City 4 or homeless encampments in general.

27. The State has adopted health regulations applicable to “transient accommodations.” [Chapter 246-360 WAC] Transient accommodations, as defined, includes 11 activities among which are hotels, motels, bed and breakfasts, hostels, and crisis shelters “offering three or more lodging units to guests for periods of less than thirty days”. [WAC 246-360-001(2)] The only activity in the list which is remotely similar to Tent City 4 is crisis shelter. However, a crisis shelter is defined as a “transient accommodation, at a permanent physical location, providing emergency or planned lodging services to a specific population, for periods of less than thirty days.” [WAC 246-360-010(8)] Therefore, the state’s transient accommodations regulations do not apply to Tent City 4. The record does not indicate that the State has any health regulations applicable to homeless encampments.
28. Tent City 4 uses portable toilets which are serviced three times a week. A portable shower unit is brought to the site. Gray water is piped into the host facility’s sewer system. (Exhibits C1 and H2, p. 2, ¶ 16)
29. The record contains general evidence that the homeless are particularly susceptible to tuberculosis and other communicable diseases. (Exhibits C5 and C12)
30. The record contains no evidence that Tent City 4 has had any reported problems with tuberculosis or other disease outbreaks.

Security

31. Tent City 4 enforces a self-created Code of Conduct. It is a drug and alcohol free zone; residents who violate the rule are “asked to leave.” (Exhibit R1.1, unnumbered p. 4) No weapons are allowed, violence is not tolerated. Intermingling of the sexes in individual tents (as opposed to cohabitation in designated couples tents) is not allowed. Loitering in the neighborhood of Tent City 4 or trespassing is not allowed. Sexual harassment is not allowed. Any of nine listed infractions may be cause for permanent expulsion from Tent City 4. (Exhibits R1.1, unnumbered p. 4, and R1.4, unnumbered p. 8)
32. Tent City 4 voluntarily adopted and continues to implement an applicant screening program which consists of a warrant and registered sex offender check through the King County Sheriff’s Office (KCSO). When a person seeking residency arrives at Tent City 4, the person is told that a warrant and sex offender check is required for entry. The internal security staff obtain the person’s name and date of birth from a government issued picture ID. Security then calls the KCSO and asks for a warrant and sex offender check on the applicant. KCSO usually responds within about five minutes. If the person has no outstanding warrants and is not a registered sex offender, admission is granted. Admission is denied if the person has outstanding warrants or is a registered sex offender. In that case, Tent City 4 calls the local police department to advise them of the situation and tries to detain the person until the police arrive to make an arrest or escort the person away. Tent City 4 security is not always successful in that regard: Some people with

outstanding warrants have left before the police arrive. (Exhibit R1.4, unnumbered p. 8, and testimony)

33. Following the December 13, 2006, public meeting, Tent City 4 sent a letter to Planning. The letter discussed neighborhood concerns regarding safety. (Exhibit R1.4, unnumbered pp. 8 & 9) The Tent City 4 residents said that while they understood the neighbors' concerns and were willing "to go the extra mile to reassure people," "being homeless does not justify the surrender of our Constitutional Right to privacy. Wholesale disclosure, without cause, of our personal identification to local police is not something we will do." (Exhibit R1.4, unnumbered p. 8)

The compromise we have agreed to at all previous locations of Tent City4 is warrant and sex offender checks, done by Tent City4 Executive Committee members, of individuals applying for entrance to the encampment. We insist that these checks be done, based on valid and legally recognized picture identification, through the King County Sheriff.

Tent City4 is prepared to continue this practice in Redmond, not because we have any legal obligation to do so, but rather out of consideration to the concerns of others.

(Exhibit R1.4, unnumbered p. 8)

34. The RPD wants the warrant and sex offender checks to be run through it rather than through the KCSO. The RPD believes that response time will be quicker, thus enhancing the ability to apprehend persons with outstanding warrants. The RPD also notes that it would then be the agency deciding if an outstanding warrant really was of concern, rather than the KCSO making that decision. Finally, with warrant and sex offender checks being performed through it, the RPD would be in a much better position to assure Redmond's citizens that such checks were being routinely performed. (Testimony)
35. Tent City 4 and SHARE/WHEEL essentially do not particularly trust local police departments. They have developed a "comfort zone" with the KCSO; they have apparently had some less than happy experiences with some local police departments. They fear that if they agree to let the police department of each community in which they locate perform the checks, each department will end up having at least a partial list of Tent City 4 residents – and they fear that the more lists that exist, the greater the chance that someone will leak (purposely or by accident) the list of Tent City 4 residents. They indicate that the stigma of homelessness can have adverse effects upon employment opportunities. (Testimony)
36. Tent City 4 has been located in close proximity to 41 public schools in the past. (Exhibit A9, numbered pp. 1 & 2) Its current St. John Vianny location is near the Carl Sandburg Elementary School. Sidewalk monitors were employed when Tent City 4 was located at St. John Vianny the first time, but were unnecessary for the current stay. The record

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contains no evidence of any attacks on children by Tent City residents at any of their locations in the past 16 years. (Exhibit R1.3 and testimony)

37. Tent City 4 members provide 24 hour security at the encampment. Tent City residents have historically taken "neighborhood walks" to pick up litter and provide a "security patrol" in the area around an encampment. The residents performing such "walks" wear an identifying vest. (Testimony)
38. The record contains conflicting interpretations of police data regarding crime associated with Tent City 4 residents. (Exhibits A4, H2, H3, R3, W1C, W1D, W1E, Z1, Z2, Z3, Z4, Z5, and R3 and testimony) Police incidents are associated with tent cities: Whenever an applicant with an outstanding warrant is arrested when seeking admission, that is a reported police incident. Police have also been called in response to complaints about noise, drunken behavior, trespass, etc.

The RPD does not believe that Tent City 4 will pose a significant threat to the City's residents or impose an unacceptable burden on it. (Exhibit R3 and testimony)

Traffic congestion

39. The TUP allows Tent City 4 to use up to five parking spaces on the St. Jude property for vehicle parking and bars Tent City 4-related parking from neighborhood streets. (Exhibit R1.5, p. 3, Condition 5) The TUP's Findings of Fact repeatedly state that Tent City 4 will not encumber more than five parking spaces. (Exhibit R1.5, pp. 6 – 8)
40. Most residents and prospective residents of Tent City 4 come and go by public transportation and taxis. (Exhibits C7 {p. 22, Finding 28¹²} and H2)
41. Horace Mann School is considered a "driving" or "walking" school by those who live in the area: School bus service is not provided and students either are driven to school by their parents/guardians or walk to school. (Exhibit R1.4 and testimony)
42. Call and Fleig fear that the presence of Tent City 4 on the St. Jude property will lead more parents/guardians to decide to drive their children to school during the term of the encampment, thus leading to increased traffic congestion in the neighborhood. (Testimony) The record contains no evidence of any such reaction/situation at any prior Tent City 4 location, many of which have been located in close proximity to public schools.
43. The St. Jude parking lots are full to overflowing during services on major Christian festival/holy days. (Exhibit R1.3 and testimony)

¹² This exhibit citation is to a Finding in Bothell's Temporary Accommodations Permit issued in 2006 for a Tent City 4 stay at First Lutheran. The mode of Tent City 4 resident travel presumably does not appreciably change from one location to another.

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Liability

44. St. Jude self-insures. (Exhibit A10)
45. Call and Fleig want the City to require St. Jude to purchase a \$1 million liability policy for the term of the encampment. (Exhibits A7 and A10)
46. Bothell's transitory accommodations regulations require the permit applicant to maintain a \$1 million liability insurance policy. (Exhibit C7, p. 32, ¶ 42)
47. Bellevue's Temporary Encampment Permit regulations require the permit applicant to disclose liability agreements and insurance policies, but set no standards or requirements for same. (Exhibit C4, p. 3, § 20.30U.121(A)(1))

General compatibility

48. Appellants argue that the proposal is simply not compatible with an established single-family residential neighborhood. They correctly observe that it is physically dissimilar from any use permitted in the R-6 zone. (Exhibit W1 and testimony)

Permit Conditions 8, 9, and 10

49. TUP Condition 8 requires "security background checks for new residents". (Exhibit R1.5, p. 3) Use of the terminology "background checks" has been discussed in Finding 9.D, above, and will not be repeated.
50. Tent City 4 and SHARE/WHEEL correctly note that the Fourth Amendment protection against unreasonable search or seizure protects them, just as it protects all citizens, from unwarranted police intrusion into their lives. While they are willing to voluntarily require prospective residents to submit to a warrant and sex offender check, they are unwilling to have such a requirement made a condition of the permit. And they are even more unwilling to have the checks done by local police. (Exhibit SW1, testimony, and argument)
51. Planning views the December 15, 2006, Tent City 4 letter (Exhibit R1.4, unnumbered pp. 8 & 9) as an addition to the St. Jude-SHARE/WHEEL TUP application; SHARE/WHEEL sees it as no such thing. (Testimony and argument)
52. TUP Condition 9 requires St. Jude to provide "sidewalk monitors" along both property frontage streets "during the normal hours when elementary and junior high school students are going to and from" school. The condition provides that the requirement may be evaluated for need after the first 30 days of the encampment. (Exhibit R1.5, pp. 3 &4) Planning has yet to develop criteria for that evaluation. (Testimony)
53. St. Jude and SHARE/WHEEL object to Condition 9 in its entirety. They believe that no evidence exists supporting the need for such a condition. St. Jude has indicated that its parishioners will voluntarily establish a sidewalk monitor program. Nevertheless, in the

- absence of evidence to support the condition, both oppose its inclusion. (Exhibit SW1, testimony, and argument of counsel)
54. TUP Condition 10 prohibits Tent City 4 residents from performing “neighborhood security foot patrols into the adjoining residential neighborhood.” (Exhibit R1.5, p. 4) Planning’s suggested revision to the wording of Condition 10 has been discussed in Finding 9.E, above, and will not be repeated.
55. St. Jude and SHARE/WHEEL object to the replacement language suggested by Planning. Basically, they argue that to the extent the condition would be enforceable at all, it would amount to an unconstitutional infringement of persons’ rights to walk on public sidewalks. On the other hand, to the extent that it merely “encourages” certain things, it would not be enforceable, but could create procedural problems if persons sought its enforcement. (Argument of counsel)
56. Any Conclusion deemed to be a Finding of Fact is hereby adopted as such.

PRINCIPLES OF LAW

Authority

A TUP decision by the Planning Director is a Type I action. An appeal from a Type I action is subject to an open record hearing before the Examiner. [RCDG 20F.30.15-060 and 20F.30.30-015 and -060] The Examiner makes a final decision on the appeal which is subject to the right of reconsideration and closed record appeal before the Council. [RCDG 20F.30.30-070(3) and -075]

Review Criteria

“The Hearing Examiner may grant the appeal or grant the appeal with modifications if: ... (b) The Examiner finds that the Type I decision is not supported by a preponderance of the evidence.” [RCDG 20F.30.30-070(1)] The Examiner evaluates the same criteria as did the original Type I permit decision maker, the Redmond Department of Planning and Community Development. The review criteria for Temporary Use Permits are set forth at RCDG 20D.190.10-030; the general conditions applicable to temporary uses are set forth at RCDG 20D.190.10-040. Those provisions are duplicated at RCDG 20F.40.170-040(1) and (2), respectively. (See Appendix hereto.)

Vested Rights

Whether an application enjoys a vested right depends upon whether a building permit will ultimately be required. For those land use actions which will ultimately require a building permit

A vested right shall not arise by virtue of an application for a conditional use permit, site plan entitlement, special use permit, variance, Development Guide amendment, right-of-way vacation, annexation, temporary use permit, Zoning

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Map amendment or any other application submitted prior to application for a building permit.

[RCDG 20F.10.60-030(1)(a)] “[L]and use actions not requiring a building permit are governed by RCDG 20F.10.50, Legal Nonconformances.” [RCDG 20F.10.60-030(4)]

Standard of Review

The standard of review is preponderance of the evidence. [RCDG 20F.30.30-070(1)(b)] “The Hearing Examiner shall accord substantial weight to the decision of the applicable department director.” [RCDG 20F.30.30.070(2)] The appellant has the burden of proof. [RCDG 20F.30.30-070(1)(a)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

DISCUSSION

Redmond’s temporary use regulations are not specific to homeless encampments, but rather apply to any situation in which a temporary use is proposed. Unlike some of its neighbor cities, Redmond does not have a regulation which specifically addresses temporary encampments. In the absence of specific, legislatively-adopted encampment regulations with which such a use would have to comply, a temporary encampment need only meet the general temporary use requirements. The temporary use regulations are, on their face, neutral and apply generally to any temporary use, whether or not hosted or sponsored by a religious organization.

Accordingly, these Findings, Conclusions, and Decision do not represent any official position by Redmond or this Examiner on the societal issue of homelessness, or on temporary encampments as a solution to, or a way to increase awareness of, homelessness. Similarly, these Findings, Conclusions, and Decision are “blind” to whatever goals St. Jude might have in desiring to host Tent City 4 or that SHARE/WHEEL might have in sponsoring and managing the encampment.

The Examiner is solely concerned with compliance with the relevant code, that is, whether Planning properly applied adopted temporary use provisions to the St. Jude -SHARE/WHEEL application.¹³

¹³ Adapted from Exhibit C7, pp. 10 and 11, ¶ 15.

CONCLUSIONS

Compliance with Procedural Criteria

1. The code requirement to accord substantial weight to Planning's decision may or may not extend to Planning's interpretation of the temporary use provisions. Jazdzewski's counsel argued that interpretation of the code is a question of law not subject to the RCDG's deference provision. That question need not be resolved as basic rules of statutory construction lead to the conclusion that Planning's interpretation is inconsistent with the language of the code.
2. Courts have developed many rules of statutory construction. The rules of statutory construction also apply to municipal codes. One such rule is that an enactment is to be read so as to provide meaning to each and every section: No section should be rendered superfluous. Another is that an enactment must be read as enacted, not as some wish it had been enacted. Finally, courts in our state have held that an administrator's interpretation of a statute cannot be tantamount to amendment of the statute.
3. The latter is effectively what has happened here. In order to make Planning's interpretation of RCDG 20D.190.10-050 and -070 work, it has had to add words and concepts not in the text of the code itself. Nothing in the code supports the notion that a temporary use, not listed in RCDG 20D.190.10-050(1) – (5), which is "associated" with a listed permitted use on the same site may be processed administratively while the same unlisted temporary use proposed for a vacant parcel would have to be processed through the Council. The term "associated" is not found in the temporary use provisions, nor is it a term of art defined within the RCDG. Planning made clear during the hearing that when it said "associated," it did not mean "accessory," a very specific, defined term which would not encompass Tent City 4 on the St. Jude property. Planning said "associated" simply meant located on the same parcel as a permitted use.
4. Planning quite correctly notes that uses listed in the Permitted Land Use Chart are permanent uses as opposed to those temporary uses listed in RCDG 20D.190.10-050. Jazdzewski's argument to the contrary is illogical and without significant merit. Therefore, almost by definition, temporary uses cannot "conform to the Permitted Land Uses Chart" since they are not listed in it. [RCDG 20D.190.070(1)] So how does one make sense of RCDG 20D.190.10-070, especially Subsection (1)?

Critical to proper understanding of RCDG 20D.190.10-070 is the phrase "except as already provided for elsewhere in these regulations." The antecedent of "these" is most certainly the temporary use regulations, Division 20D.190.10 RCDG. Thus, temporary uses listed in RCDG 20D.190.10-050 would be exempt from the requirement to comply with the Permitted Land Uses Chart; others would not be exempt.

5. Section 20D.190.10-050 RCDG lists "types of temporary uses." Subsections (1) – (5) provide examples of five types of temporary uses. Subsection (6) allows the Planning Director to approve other specific temporary uses not included in the Subsections (1) –

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(5) listing if they are of the same type as those in the list. In other words, the Subsections (1) – (5) lists are not all-inclusive; other uses of the same general types may well exist. It is those other uses of the same types which the Planning Director may essentially “add” to the lists under authority of Subsection (6).

6. Section 20D.190.10-070 RCDG then provides an avenue for consideration of a proposed temporary use wholly different from the types of uses in the RCDG 20D.190.10-050(1) – (5) lists. That process calls for consideration of the proposal at an open record hearing by the City Council.

Such an interpretation renders all code sections relevant. Such an interpretation makes sense in that approving a proposed temporary use which is significantly different from the temporary uses listed elsewhere in the temporary use regulations is very much akin to a legislative action. Legislative actions are the purview of the City Council.

Such an interpretation does not require the addition of words like “associated,” nor does it create the illogical distinction that the same proposed temporary use would be processed under two very different systems simply based on whether it was proposed to be conducted on a vacant lot.¹⁴

7. A temporary encampment, regardless of for whom or by whom it is to be established, is unlike any of the temporary uses listed in RCDG 20D.190.10-050(1) – (5). A temporary encampment, regardless of for whom or by whom it is to be established, is not a listed use in the Permitted Land Use Chart for residential zones. Therefore, the code requires that a TUP application for a temporary encampment, regardless of for whom or by whom it is to be established, must be presented to the Council for its action. Planning lacks jurisdiction under the RCDG as presently constituted to make the decision on the application.

Thus, the permit issued by Planning on December 21, 2006, is void and without effect. The Jazdzewski and Wilcox appeals regarding this issue must be granted; the permit must be vacated; and the application must be remanded to Planning so that the matter may be scheduled for an open record hearing before the Council in accordance with RCDG 20D.190.10-070(2).

8. Analysis of the seven appeals could end at this point. However, given the amount of time and effort expended by the parties in presenting their cases, given the amount of time spent in the hearing process, and given that the Council, to which the Examiner’s Decision may be appealed, has the authority to disagree with the Examiner on the code interpretation question, it is prudent to examine the remaining issues on appeal.

¹⁴ The vacant lot distinction is further undermined by the fact that seasonal Christmas tree sales are a listed temporary use in RCDG 20D.190.10-050(2). Some Christmas tree sales lots are co-located with some permanent land use (for example occupying a corner of a store’s parking lot), but others occupy vacant lots.

Compliance with Approval Criteria

9. The criteria for approval of a temporary use are set forth at RCDG 20D.190.10-030. The first criterion requires that the temporary use “shall not impair the normal, safe, and effective operation of a permanent use on the same site.” As Planning quite correctly notes in its TUP decision, if the encampment is kept to the grassy area to the west of the church buildings and does not intrude onto the parking areas by more than the five stalls authorized for Tent City 4 parking, the encampment will not materially impact church activities and operation.

However, the preponderance of the evidence indicates that parking at the church is already a problem during Christian festivals. The Easter celebration will occur during the run of Tent City 4 at St. Jude’s. Easter is a major, some might say “the major,” Christian festival. Plan Theta would occupy an additional eight spaces. While that is not a huge percentage of the 230 spaces in the parking lot, it more than doubles the encampment’s impact on parking and would push that many more vehicles onto neighborhood streets. Plan Theta violates TUP Condition 3 and would adversely affect the normal operation of the church. The overflow tent portion of Plan Theta cannot be approved if this criterion is to be met.

Subject to the above qualifier, the preponderance of the evidence does not indicate that the encampment would violate this criterion. With substantial weight accorded to Planning’s decision, it must be concluded that the appellants have failed to show error on Planning’s part except with respect to the above qualifier.

10. The second and fourth criteria are essentially overlapping: They both require a finding that the proposed temporary use will be compatible with surrounding uses. Compatibility is also one of the primary tests in the Conditional Use process. Churches and schools, to name but two uses, are Conditional Uses in residential zones. No one would suggest that the characteristics of a church or of a school are the same as those of a single-family residence. Yet, those uses are routinely found to be compatible with surrounding permitted uses in a residential neighborhood.

That reality is indicative of the fact that “compatibility” does not mean “the same as.” Compatibility may be considered much like a successful marriage: Each partner brings something different to the union, but those differences blend and meld together successfully.

Tent City 4 will not generate substantial traffic, will be largely screened from view from the adjacent streets, and will be truly temporary. The appellants have not produced a preponderance of evidence to show that it will alter the character of the surrounding area. Nor have they produced a preponderance of evidence that crime will measurably increase. The evidence on crime is mixed; it is not a preponderance.

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The preponderance of the evidence does not indicate that the encampment would violate this criterion. With substantial weight accorded to Planning's decision, it must be concluded that the appellants have failed to show error on Planning's part.

11. The third criterion addresses public health and safety and traffic impacts. While it may well be that the homeless population as a whole suffers from certain diseases, mental health problems, and drug addiction at a higher rate than the population as a whole, that general evidence has not been shown to apply to the subset of the homeless which inhabit Tent City 4. Most of the police calls documented in the evidence are the result of Tent City 4's security personnel calling the police to ask that a troublemaker be removed. The preponderance of evidence simply does not show that Tent City 4 has caused significant crime problems in its host areas.

No evidence suggests that Tent City 4 itself will generate any measurable traffic. The neighborhood concern is that a greater percentage of neighborhood residents may decide to drive their children to school than already do. The record contains no evidence to show that such has happened in those prior locations where Tent City 4 has been located close to public schools. This argument is based on a perceived fear rather than fact. Land use decisions may not be based on generalized fears.

The preponderance of the evidence does not indicate that the encampment would violate this criterion. With substantial weight accorded to Planning's decision, it must be concluded that the appellants have failed to show error on Planning's part.

12. The fifth and last criterion is rather general: Compliance with "goals, policies and standards of the Development Guide" is required. The "Development Guide" is, of course, the RCDG. While the RCDG does include a Title which essentially serves as a place-holder for the comprehensive plan, case law in Washington State makes it quite clear that a comprehensive plan is not a regulation. The regulatory Titles in the RCDG do not contain goals and policies. Properly conditioned, the proposal would be consistent with the purpose of the Temporary Uses Division.

The preponderance of the evidence does not indicate that the encampment would violate this criterion. With substantial weight accorded to Planning's decision, it must be concluded that the appellants have failed to show error on Planning's part.

13. The appellants did not challenge compliance with the General Conditions as set forth at RCDG 20D.190.10-040. The preponderance of the evidence does not indicate that the encampment would violate any of those requirements. With substantial weight accorded to Planning's decision, it must be concluded that the appellants have failed to show error on Planning's part.

Conditions

14. If Redmond had a specific regulation governing temporary encampments, as do some of its neighbor cities, then such a regulation might include a legislatively established

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standard for length of stay. But Redmond does not have any such regulation. The Temporary Uses standards allow a temporary use to operate up to six months per year. [RCDG 20D.190.10-040(5)] While some of the appellants do not want the encampment located at St. Jude at all, the evidence does not correlate any adverse impacts with length of stay. In order for Planning to have limited the encampment to something less than allowed by code, it needed evidence that a stay longer than 90 days would create impacts that would not be present were the encampment in place for 90 days or less. This record contains no such evidence.

The preponderance of the evidence does not indicate that the permit term should have been reduced from that requested by the applicants. Within the time period allowed by the TUP, length of stay is a matter between the host, St. Jude, and the tenant, Tent City 4. With substantial weight accorded to Planning's decision, it must be concluded that the appellants have failed to show error on Planning's part.

15. The preponderance of the evidence shows that Plan Theta is not acceptable. It violates Conditions 2 and 3, important conditions needed to minimize overflow parking impacts at the church. Every parking space encumbered by Tent City 4 is one less space available for church use. That portion of Condition 1 which requires submittal of a revised plan has not yet been met. Further, Plan Theta cannot meet the single enclosure portion of Condition 2. That requirement is also justified and should not be deleted. If the site is not large enough to enclose the encampment within one fenced area completely off the parking lots, then either the facility must be reduced in size or another location must be selected. Compatibility and impact minimization cannot be assured otherwise.
16. Condition 3 should not be watered down or eliminated for the reasons stated above. Planning's rationale for approving the TUP repeatedly states that no more than five parking spaces will be impacted. Planning should not now renege on one of the key points in its permit analysis process.
17. Condition 8 cannot be sustained as proposed. In the first place, the term "background checks" is incorrect: No one volunteered to perform or submit to background checks and the RPD testified that was not equipped to perform such checks. Frankly, no one seems to know how that term became part of the permit. The proper term is "warrant and sex offender checks." At the very least that amendment is needed.

Municipal review of a TUP, like other project permit applications, is based upon the specific proposal presented by the applicant. When an applicant includes specific representations within its application, not only are those representations an integral part of the application, but also the municipality has every right to rely on those representations in its decision making process. To hold otherwise would set up a "bait and switch" opportunity: An applicant promises one thing in the application, but then does something else after the permit is issued.

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SHARE/WHEEL is somewhat disingenuous when it argues that the December 15, 2006, Tent City 4 letter (Exhibit R1.4, unnumbered pp. 8 & 9) does not constitute a part of its application. It most certainly contains a voluntary offer. Applications may be amended by their applicants as the review process occurs. In fact, such frequently happens. When a letter is sent to Planning by an applicant containing an offer directly related to its pending application, Planning has every right to believe that the letter constitutes an amendment/addition to its application.

Appeal from a condition which merely restates an offer/commitment made by the applicant within the permit application is frivolous and without merit on its face: An applicant should not be able to appeal that which it offered. That portion of the St. Jude-SHARE/WHEEL appeal must be denied.

However, since Condition 8 is based upon an offer voluntarily made by the applicant, and since constitutional principles would doubtless prohibit the City from mandating such a condition without a voluntary offer, the condition must accurately reflect that which was offered. While the Examiner fully understands and agrees with the RPD's rationale for doing the warrant and sex offender checks itself, the fact remains that Tent City 4 did not offer to have RPD do the checks. And while the Examiner believes that Tent City 4's fears about disclosure of resident names is likely no more rational than some of the neighbors' fears which Tent City 4 characterizes as unfounded stereotyping, the fact remains that the condition may only reflect that which Tent City 4 offered. Condition 8 must be revised to comport with Tent City 4's offer as set forth in the December 15, 2006, letter. To that extent, the St. Jude-SHARE/WHEEL appeal must be granted.

18. The preponderance of the evidence provides no basis for Condition 9. The record does not show that Tent City 4 residents have caused problems with school children passing the encampment going to and from nearby schools. And the preponderance of the evidence shows that Tent City 4 has been located in close proximity to public schools at many of its locations. Condition 9 appears to be a condition designed to placate neighborhood fears. Condition 9 must be stricken because of an absence of evidence to support it. To that extent, the St. Jude-SHARE/WHEEL appeal must be granted.
19. The proposed rewording of Condition 10 would create a condition that really isn't a condition. A condition which merely encourages the permittee to discourage some action is hardly a condition. It most certainly is not enforceable. Planning agrees with SHARE/WHEEL that it is not legal to prohibit a person from walking on the public sidewalks, unless that person is committing some crime while so doing.

Here again, the condition appears to be designed to placate neighborhood fears. Condition 10 must be stricken because as written it is illegal, as proposed it is unenforceable, and, based on this record, it is not justified. To that extent, the St. Jude-SHARE/WHEEL appeal must be granted.

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20. The preponderance of the evidence demonstrates compliance with Condition 12. Compliance with a condition is no reason to eliminate the condition during an appeal. The condition should remain to document the full extent of the requirements associated with the TUP. To that extent, the St. Jude-SHARE/WHEEL appeal must be denied.
21. Any Finding of Fact deemed to be a Conclusion is hereby adopted as such.

DECISION

The Examiner *Pro Tem* **GRANTS** the Jazdzewski appeal; **GRANTS IN PART**, in principle, the Zuckerberg, Call, Wilcox, St. Jude-SHARE/WHEEL, and Fleig appeals as set forth fully in the preceding Conclusions; and **DISMISSES** the Wherrett, J. Schur, S. Schur, and Ernst appeals. The application is **REMANDED** for processing in accordance with this Decision.

Decision issued February 5, 2007.

/s/ John E. Galt

JOHN E. GALT,

Hearing Examiner *Pro Tem*

PROCEDURE FOR RECONSIDERATION

Any person who participated in the hearing may file a written request for reconsideration by the Examiner *Pro Tem*. [RCDG 20F.30.30-070(3)] Requests for reconsideration must be filed with the Hearing Examiner's Office, City of Redmond, Mail Stop: 3NFN, 15670 NE 85th Street, P.O. Box 97010, Redmond Washington, 98073-9710, not later than 5:00 p.m. on February 20, 2007. A request for reconsideration shall explicitly set forth alleged errors of procedure or fact. Timely filed requests for reconsideration will be processed pursuant to RCDG 20F.30.30-070(3) and RCDG Appendix 20F-2, §IX.C.3.

NOTICE OF RIGHT OF APPEAL

You are hereby notified that the foregoing Findings of Fact, Conclusions, and Decision are the final action on this application subject to the right of appeal to the Redmond City Council by the project applicant, the City, or any person who participated in the Examiner's hearing. [RCDG 20F.30.30-075(1)(a)] Appeal procedures are governed by RCDG 20F.30.30-075 to which the reader is referred for detailed instructions. Please include the appeal file number on any correspondence regarding this case.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."

APPENDIX:

**RCDG TEMPORARY USE REGULATION EXCERPTS¹⁵
 PARALLEL CONTENT COMPARISON**

TITLE 20D PROVISIONS	TITLE 20F PROVISIONS
<p>20D.190.10-050 Allowed Temporary Uses.</p> <p>The following types of temporary uses, activities and associated structures may be authorized, subject to specific limitations noted herein and as noted in RCDG 20D.190.10-030, 20D.190.10-040, 20D.190.10-060 and as may be established by the Planning Director:</p> <ul style="list-style-type: none"> (1) Outdoor art and craft shows and exhibits. (2) Retail sales such as Christmas trees, seasonal retail sale of agricultural or horticultural products, firewood, seafood, etc. (3) Mobile services such as veterinary services for purposes of giving shots. (4) Push cart vendors. No mechanical audio or noise making devices, nor loud shouting or yelling will be permitted to attract attention. (5) Group retail sales such as swap meets, flea markets, parking lot sales, Saturday Market, auctions, etc. (6) The Planning Director may authorize additional temporary uses not listed in this subsection [section¹⁶], when it is found that the proposed uses are in compliance with the provisions of this section [division]. (Formerly 20C.20.245(25)) 	<p>20F.40.170-020 Scope.</p> <p>(3) The following types of temporary uses, activities and associated structures may be authorized, subject to specific limitations noted herein and as noted in RCDG 20F.40.170-040(2) and as may be established by the Administrator:</p> <ul style="list-style-type: none"> (a) Outdoor art and craft shows and exhibits; (b) Retail sales such as Christmas trees, seasonal retail sale of agricultural or horticultural products, firewood, seafood, etc; (c) Mobile services such as veterinary services for purposes of giving shots; (d) Push cart vendors. No mechanical, audio or noise-making devices, nor loud shouting or yelling will be permitted to attract attention; (e) Group retail sales such as swap meets, flea markets, parking lot sales, Saturday Market, auctions, etc.; (f) The Planning Director may authorize additional temporary uses not listed in this subsection [section], when it is found that the proposed uses are in compliance with the provisions of this section [division].
<p>20D.190.10-070 Variations from Permitted Land Uses Chart.</p> <p>(1) All temporary uses shall conform to the Permitted Land Uses Chart except as already provided for elsewhere in these regulations.</p>	<p>20F.40.170-040 Decision Criteria.</p> <p>(3) Variations from Permitted Land Uses Chart.</p> <p>(a) All temporary uses shall conform to the permitted land uses chart except as already provided for elsewhere in these regulations and except as provided below.</p> <p>(b) The City Council may authorize a</p>

¹⁵ Headings and text copied from the City of Redmond official web site unless otherwise noted.

¹⁶ The words in brackets in both columns are the Examiner's substitutions to compensate for the code restructuring in which the text was not changed to match the new hierarchical structure of the code.

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<p>(2) Except, the City Council may authorize a temporary use in violation of the Permitted Land Uses Chart after (a) reviewing a recommendation from the Technical Committee, (b) holding a public hearing, (c) finding an undue hardship, and (d) specifying a specific date for termination. (Formerly 20C.20.245(35))</p>	<p>temporary use that does not conform to the permitted land uses chart after:</p> <ul style="list-style-type: none"> (i) Reviewing a recommendation from the Technical Committee; (ii) Holding a public hearing; (iii) Finding an undue hardship; and (iv) Specifying a specific date for termination. (Ord. 2118)
<p>20D.190.10-030 Determinations.</p> <p>The Planning Director may authorize temporary uses after consultation and coordination with all other applicable City departments and other agencies and only when all the following determinations can be made:</p> <ul style="list-style-type: none"> (1) The temporary use will not impair the normal, safe, and effective operation of a permanent use on the same site. (2) The temporary use will be compatible with uses in the general vicinity and on adjacent properties. (3) The temporary use will not significantly impact public health, safety or convenience, or create traffic hazards or congestion, or otherwise interrupt or interfere with the normal conduct or uses and activities in the vicinity. (4) The use and associated structures will be conducted and used in a manner compatible with the surrounding area. (5) The temporary use shall comply with the goals, policies and standards of the Development Guide. (Formerly 20C.20.245(15)) 	<p>20F.40.170-040 Decision Criteria.</p> <ul style="list-style-type: none"> (1) The Administrator may authorize temporary uses after consultation and coordination with all other applicable City departments and other agencies and only when all the following determinations can be made: <ul style="list-style-type: none"> (a) The temporary use will not impair the normal, safe, and effective operation of a permanent use on the same site. (b) The temporary use will be compatible with uses in the general vicinity and on adjacent properties. (c) The temporary use will not significantly impact public health, safety or convenience, or create traffic hazards or congestion, or otherwise interrupt or interfere with the normal conduct or uses and activities in the vicinity. (d) The use and associated structures will be conducted and used in a manner compatible with the surrounding area. (e) The temporary use shall comply with the goals, policies and standards of the Development Guide.
<p>20D.190.10-040 General Conditions.</p> <ul style="list-style-type: none"> (1) A temporary use conducted in a parking facility shall not occupy or remove from availability more than 25 percent of the spaces required for the permanent use. (2) Each site occupied by a temporary use must provide or have available sufficient parking and vehicular maneuvering area for customers. Such parking need not comply with RCDG 20D.130.10-050, Parking, but must provide safe 	<p>20F.40.170-040 Decision Criteria.</p> <ul style="list-style-type: none"> (2) General Conditions. <ul style="list-style-type: none"> (a) A temporary use conducted in a parking facility shall not occupy or remove from availability more than 25 percent of the spaces required for the permanent use. (b) Each site occupied by a temporary use must provide or have available sufficient parking and vehicular maneuvering area for customers. Such parking need not comply with RCDG 20D.130.10-050, Parking, but must provide safe

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<p>and efficient interior circulation and ingress and egress to and from public rights-of-way.</p> <p>(3) The temporary use shall comply with all applicable standards of the Seattle-King County Health Department.</p> <p>(4) No temporary use shall occupy or use public parks in any manner unless specifically approved by the Parks Department.</p> <p>(5) No short-term temporary use shall occupy or operate within the City of Redmond for more than six months within any calendar year unless approved by the City Council under a long-term temporary use permit. A day of operation shall mean any or part of any day in which the business is conducted. The six months need not run consecutively. The six months may occur at any time within a calendar year as long as each day is designated and approved.</p> <p>(6) All temporary uses shall obtain, prior to occupancy of the site, all applicable City of Redmond permits, licenses and other approvals (i.e., business license, building permit, administrative approvals, etc.)</p> <p>(7) The applicant for temporary use shall supply written authorization from the owner of property on which the temporary use is located.</p> <p>(8) Each site occupied by a temporary use shall be left free of debris, litter, or other evidence of the temporary use upon completion of removal of the use.</p> <p>(9) All materials, structures and products related to the temporary use must be removed from the premises between days of operation on the site, provided that materials, structures and products related to the temporary use may be left on-site overnight between consecutive days of operation. By virtue of having been in consistent operation prior to the existence of the ordinance codified in this chapter the open air craft and farmer's market operation, commonly known as the Saturday Market, shall be allowed to store structures on-site between weekend activity of the Market, but such structures must be reviewed by the Director annually and permission to leave them in place between market sessions may be denied if they become a visual blight, safety, or health problem. They shall be removed at the end of the permit period.</p> <p>(10) If the Planning Director believes notice to adjacent property owners should be made prior to approval, this shall be done and the 10-day</p>	<p>and efficient interior circulation and ingress and egress to and from public rights-of-way.</p> <p>(c) The temporary use shall comply with all applicable standards of the Seattle-King County Health Department.</p> <p>(d) No temporary use shall occupy or use public parks in any manner unless specifically approved by the Parks Department.</p> <p>(e) No short-term temporary use shall occupy or operate within the City of Redmond for more than six months within any calendar year unless approved by the Technical Committee under a long-term temporary use permit or by the City Council for an extended-term temporary use permit. A day of operation shall mean any or part of any day in which the business is conducted. The six months need not run consecutively. The six months may occur at any time within a calendar year as long as each day is designated and approved.</p> <p>(f) All temporary uses shall obtain, prior to occupancy of the site, all applicable City of Redmond permits, licenses and other approvals (i.e., business license, building permit, administrative approvals, etc.)</p> <p>(g) The applicant for temporary use shall supply written authorization from the owner of property on which the temporary use is located.</p> <p>(h) Each site occupied by a temporary use shall be left free of debris, litter, or other evidence of the temporary use upon completion of removal of the use.</p> <p>(i) All materials, structures and products related to the temporary use must be removed from the premises between days of operation on the site; provided, that materials, structures and products related to the temporary use may be left on-site overnight between consecutive days of operation. By virtue of having been in consistent operation prior to the existence of the ordinance codified in this chapter the open air craft and farmer's market operation, commonly known as the Saturday Market, shall be allowed to store structures on-site between weekend activity of the market, but such structures must be reviewed by the Administrator annually and permission to leave them in place between market sessions may be denied if they become a visual blight, safety, or health problem. They shall be removed at the end of the permit period.</p>

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<p>approval period shall be waived.</p> <p>(11) The Planning Director may establish such additional conditions as may be deemed necessary to ensure land use compatibility and to minimize potential impacts on nearby uses. These include but are not limited to, time and frequency of operation, temporary arrangements for parking and traffic circulation, requirement for screening or enclosure, and guarantees for site restoration and cleanup following temporary uses. (Ord. 2118; Formerly 20C.20.245(20))</p>	<p>(j) The Administrator may establish such additional conditions as may be deemed necessary to ensure land use compatibility and to minimize potential impacts on nearby uses. These include but are not limited to, time and frequency of operation, temporary arrangements for parking and traffic circulation, requirement for screening or enclosure, and guarantees for site restoration and cleanup following temporary uses. (Ord. 2118)</p>